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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOHN KEVIN PARKER, Defendant and Appellant.	C068847 (Super. Ct. No. 10F03956)

A jury convicted defendant John Kevin Parker of possession of a firearm by a felon and obstructing or delaying a peace officer. Defendant admitted a prior serious felony conviction and three prior prison terms. The trial court denied his motion for a new trial and his motion to dismiss the prior strike conviction, and sentenced defendant to seven years in prison.

Defendant contends the trial court (1) erred in denying his motion for a new trial, and (2) abused its discretion in denying his motion to dismiss the prior strike conviction. Finding no error or abuse of discretion, we will affirm the judgment.[1]

BACKGROUND

Sacramento Police Officer Alexander Giy made a traffic stop on a gray sedan with unlawfully tinted windows. The car stopped in front of a storage facility. Defendant, the right rear passenger, got out of the car while holding a gray object close to his body. Defendant ran from the officer and into a back alley. Officer Giy broadcast defendant's path of travel and responding officers took defendant into custody.

The gray object turned out to be a T-shirt and Officer Giy did not see defendant throw anything. Later that day, however, when Officer Giy reviewed the video from his patrol car camera, he observed that at one point during defendant's flight he slowed down and appeared to throw something. Giy returned to the scene and found a loaded .45-caliber handgun on the ground along defendant's path of travel. The gun had been placed there recently. The patrol car video was played for the jury.

The parties stipulated that defendant had a prior felony conviction and that no latent fingerprints were found on the handgun.

Defendant presented evidence that another person could have placed the gun where it was recovered. Erica Farley, an employee of the storage facility, testified that each day she sees people traveling in the area of defendant's flight. On cross-examination, Farley conceded that her view of the area from her office window is partially obstructed and that she could see only a small portion of the street defendant ran

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[1] We have identified a clerical error on the abstract of judgment. One of the enhancements cites "PC 677.5(b)" rather than "PC 667.5(b)." We will direct the trial court to correct the abstract of judgment. Any party aggrieved may petition for rehearing.

down. She said only a couple people per day use that street. But on redirect Farley said 20 to 30 cars may pass through the area during the late afternoon to early evening hours.

Additional facts are included in the discussion as relevant to defendant's contentions on appeal.

A jury convicted defendant of possession of a firearm by a convicted felon (Pen. Code,[2] former § 12021, subd. (a)(1)) and obstructing or delaying a peace officer (§ 148, subd. (a)(1)). Defendant admitted a prior serious felony conviction (§§ 667, subds. (b)-(i), 1170.12) and having served three prior prison terms (§ 667.5, subd. (b)). The trial court sentenced him to seven years in prison.

DISCUSSION

I

Defendant contends the trial court erred in denying his motion for a new trial because the jury was "tainted."[3] He argues this occurred when the prosecutor's closing argument improperly shifted the burden of proof to the defense, and when an audio recording that had not been admitted into evidence was played during jury deliberations. Defendant claims the denial of his motion for a new trial violated his federal constitutional right to due process.

A

Closing Argument

The defense theory at trial was that someone else put the gun on the ground between the time defendant was arrested and the time Officer Giy returned to search the area.

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[2] Undesignated statutory references are to the Penal Code.

[3] Although defendant says the entire "jury pool" was tainted, his argument refers to the empanelled jurors, not the much larger venire or "pool" from which the jurors were drawn.

Among other things, the prosecutor argued during closing argument: "You can imagine a set of circumstances where someone else put that gun there except for the -- aside from the defendant. But that's all they can rely on, is imagining the possibility that something like that happened. [¶] The evidence points to one thing. The evidence points to [defendant] putting that gun in there. Nobody else. [¶] So there is no evidence about what actually happened that day, what happened during this pursuit, presented by the defense. And what else there was, was how about somebody that was in that car? How about someone that said --"

Defense counsel objected at that point on the ground of "improper burden shifting."

The trial court replied: "Well, ladies and gentlemen, the objection is being made that [the prosecutor's] comment may be improperly shifting the burden on the defense to present certain evidence to you. And as you heard earlier, they are not required to present any evidence to you. [¶] I don't think it is, so I'm going to overrule the objection. But the defense, again, to remind you, is not required to present any evidence to you."

The prosecutor continued: "That's absolutely true. They are not required to put any evidence on. But if there's a logical witness that could provide evidence and there's a failure to call that witness, then I can comment on that. Okay? [¶] If there was one of the associates of the defendant, who was in that car, to say, 'We were just on our way back from Wendy's, and we were just headed up to . . .' you know, wherever '. . . to eat food, you know. Of course, we didn't have any guns in the car.' [¶] I don't know if the defendant just said, 'I'm freaking out. I'm just going to run. I have no reason to, but I'm just going to do it,' you know. We didn't hear any witnesses say anything like that. [¶] And we know that there is a car of people with the defendant before he hopped out and ran with the gun. But we didn't hear a word from any of them. Okay? And if they were able to provide some of that evidence, we would have heard from them. But the bottom --"

Defense counsel again objected on the ground of burden shifting, and the trial court again overruled the objection.

The prosecutor also discussed jury instructions, and in particular the instruction regarding proof beyond a reasonable doubt. The prosecutor said "the burden is on us to prove the defendant is guilty and that's what we've done."

Defense counsel began her closing argument by commenting on the People's burden of proof and defendant's presumption of innocence. She asked the jury not to shift the burden to the defense. Defense counsel then addressed the "failure to call witnesses since that was kind of one of the ending points that the district attorney made." She reiterated that there was no obligation to call witnesses and that the burden of proof remained with the prosecutor. Defense counsel repeated the jury instruction on reasonable doubt and continued to highlight that the burden was with the People.

Defense counsel argued that "none of the officers would have left the scene without checking the path that [defendant] ran. They wouldn't have done that. They are trained that when somebody runs, there's something that's going on. They believed that it's always to discard something." Defense counsel added, "[a]ll those officers had their suspicions in that moment. The suspicions didn't arise three to four hours later. Those suspicions were in that moment. The moment that Officer Giy says [defendant] started running through the time that they finally all dispersed. . . . [T]hey walked and they confirmed, they're pointing. 'Yeah, we checked back there.' There was nothing. [¶] If there had been something, we would have had a report from those officers because now there would have been something for them to report on."

Before the prosecutor's rebuttal, the trial court stated, "Folks, partly because [the prosecutor] has the burden of proof, he gets to talk to you again for a few minutes."

During rebuttal, the prosecutor touched on reasonable doubt and the corresponding jury instruction several more times. The prosecutor said: "Then there was quite a bit said about that the burden is not on the defense, it's on the People. And, again, I

emphasize that is very true. Okay? But like I said before, I can comment on a failure to call logical witnesses. . . . [¶] . . . [¶] The people that were not called were the people that do know presumably, right? They are in the car with him, they know the defendant, and they had at least an understanding of what was going on that day. Those people weren't called." Instead, according to the prosecutor, the defense called a witness who had no knowledge of the case and had a "view of 1 percent" of the area in question.

The trial court instructed the jury with CALCRIM No. 220, directing the jury that defendant is presumed innocent and that the People have the burden of proving defendant guilty beyond a reasonable doubt.

Jury Deliberations

During motions in limine, the trial court granted, without objection, the prosecutor's request to play the video from Officer Giy's car camera. The prosecutor indicated that the audio from the camera would not be played because it was not necessary. The video was subsequently played for the jury during trial.

Later, however, during jury deliberations, the trial court said it was advised that the deliberating jurors "may have played the audio that accompanies the video." The trial court questioned the foreperson about the situation. The foreperson said, "I heard his rights being read to him. I heard his name and I heard his birth date. That's it." The trial court told the foreperson the audio was not part of the record. The trial court then brought in the rest of the jury and admonished them: "I just want to make clear to all of you that the audio is not part of the record. Okay. We didn't think it was relevant or essential to the issues in this case. And in inadvertence, the sound was left on, the device in which you played that video. Okay? [¶] But the audio is not part of the record. So whatever you heard, even though it may have been brief, you should just disregard it and not consider that at all in arriving at your decision. All right?"

The jurors agreed and indicated that there would be no problem following the trial court's admonishment. Nonetheless, Juror No. 2 asked about a portion of the audio,

saying, "I got the impression that when the police officers went back to inspect the scene, that they were not aware of the route. That's what I heard on the audio. That's the impression I got from the audio. When they went back to the scene, that they were not aware of the -- of the route the runner took when they went back to look."

The trial court admonished Juror No. 2 that "the point is that that part is not in the record and you shouldn't consider that audio at all in deciding the issues in this case." The juror indicated he understood the admonishment. The trial court concluded by reiterating that the jurors "should not be influenced at all by what you may have heard said when that audio -- when that video was played. The audio is not part of the record."

After deliberations resumed, defense counsel asked to question Juror No. 2 about what he actually heard. The trial court declined the request because "the jurors assured me they are going to not listen, not allow the audio to enter into their decision. I think that I'm going to take them at their word for now." The trial court expressed concern about invading the jurors' deliberative process at that point, but it did not preclude defense counsel from raising the issue at a later time. When defense counsel expressed doubt that Juror No. 2 could put "any of that out of his mind," the trial court replied that it was going to "take the jurors at their word that they will, so that's what we'll do." Nonetheless, with the approval of both counsel, the trial court sent the jurors an order prohibiting them from discussing the audio.

The next day, defense counsel requested a mistrial, asserting that the entire jury was tainted by Juror No. 2's observations in open court. Defense counsel argued the juror's impression in listening to the audio (that the officers were not sure of the flight route) was inconsistent with defense counsel's closing argument (that the officers searched for discarded objects along the route but found nothing), and thus the juror's statement undermined defense counsel's credibility with the remaining jurors.

The trial court denied the request for mistrial, stating "the jurors were admonished, they indicated to the Court that they would follow my admonishment. [¶] I mean, there

may be a possibility somebody may not. There may be -- we are speculating regarding how the other jurors took Juror No. 2's comments, whether or not they even understood them, we don't know. And I'm not going to declare a mistrial based on speculation at this time."

Prior to sentencing, defendant made a motion for new trial, asserting that the prosecutor committed misconduct during closing argument and that the jury heard the audio portion of the police video during deliberations. Regarding the closing arguments, the trial court said the jury was instructed repeatedly that the defense had no burden of proof, and there was no showing that the verdicts would have been different but for the prosecutor's comments. As for the jury deliberations, the trial court said it did not believe the inadvertent and brief playing of the audio impacted the jury's decision or warranted a new trial. The trial court denied the motion for new trial.

B

" ' " 'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.' " [Citations.] " '[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background.' " [Citation.]' " (*People v. Howard* (2010) 51 Cal.4th 15, 42-43, quoting *People v. Delgado* (1993) 5 Cal.4th 312, 328; see *People v. Dyer* (1988) 45 Cal.3d 26, 52.)

Closing Argument

Defendant claims the trial court should have granted his motion for a new trial because the jury was tainted when the prosecutor shifted the burden of proof to the defense. When a claim " 'focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 260.)

The record indicates that the prosecutor did not shift the burden of proof to the defense, but instead commented on the defense's failure to call logical witnesses. (E.g., *People v. Ford* (1988) 45 Cal.3d 431, 436, 445; *People v. Ratliff* (1986) 41 Cal.3d 675, 691.) In any event, there is no reasonable likelihood that the jury construed any of the prosecutor's remarks as lowering his burden of proof or shifting the burden to the defense. (*People v. Prieto, supra*, 30 Cal.4th at p. 260.) The prosecutor's subsequent remarks, and the trial court's repeated oral and written instructions, made absolutely clear that the People had the burden to prove defendant's guilt beyond a reasonable doubt. Nothing in the record suggests the jury interpreted the prosecutor's remarks as somehow shifting the burden of proof to defendant. The jury is presumed to have followed the trial court's instructions, which were sufficient to dispel any prejudice. (*People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Cunningham* (2001) 25 Cal.4th 926, 1014.)

Jury Deliberations

Where jurors receive information from extraneous sources, the entire record must be reviewed and a verdict will be set aside only " 'if there appears a substantial likelihood of juror bias.' " (*People v. Danks* (2004) 32 Cal.4th 269, 303.) Bias can appear in two different ways.

" 'First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror.' " (*Ibid*.) " 'Under this standard, a finding of "inherently" likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment.' " (*Ibid*.) Here, the record indicates that the audio from the patrol car camera recorded defendant's name, birth date, and an advisement of defendant's rights. The audio may also have included information that the arresting officers did not know the path of flight. Such evidence was not so prejudicial that it would have warranted reversal of the judgment if it had been introduced at trial.

Second, even if the extraneous information was not so prejudicial as to cause inherent bias, we nonetheless consider the totality of the circumstances to determine objectively whether there is a substantial likelihood of actual bias. (*People v. Danks, supra,* 32 Cal.4th at p. 303.) Actual bias arises when a juror becomes "unable to put aside her impressions or opinions based upon the extrajudicial information she received and to render a verdict based solely upon the evidence received at trial." (*People v. Nesler* (1997) 16 Cal.4th 561, 583.)

After reviewing the totality of the circumstances, the trial court found there was no basis to conclude that the jury was impacted by the audio recording. And there is no evidence that any juror was unable to put aside his or her impressions or opinions based upon the audio. (*People v. Nesler, supra,* 16 Cal.4th at p. 583.) The record fails to show any prejudicial juror misconduct or any likelihood of juror bias.

Defendant's motion for a new trial was properly denied.

II

Defendant also contends the trial court abused its discretion in refusing to dismiss his prior strike allegation. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).) Defendant's *Romero* motion asked the trial court to exercise its discretion under section 1385 to dismiss the prior strike allegation for purposes of sentencing. (Citing *People v. Williams* (1998) 17 Cal.4th 148, 161.)

" '[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent

felonies.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) A trial court's failure to dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. (*Id*. at p. 376.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at p. 377.) Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, the appellate court will affirm the trial court's ruling, even if it might have ruled differently in the first instance. (*Id*. at p. 378.)

Here, the trial court recognized that in exercising its discretion it had to "look at the defendant's whole record, not only this case, but his background and record to see whether or not the interest of justice would justify granting such a motion." The trial court did so and concluded that defendant "has a rather extensive history going back to his time as a juvenile. And . . . he's already done three stints in state prison, and apparently then has continued to re-offend as we had in this case. [¶] Therefore, I don't think that he is the kind of person that would merit the Court granting such a motion. So at this time the Court is exercising its discretion not to strike the strike. So the motion's denied."

In support of his claim that the trial court abused its discretion, defendant echoes his written argument to the trial court: that he "is youthful, just thirty years old when this crime was committed. Earlier in life, [he] made some unfortunate decisions, based mostly on his drug use, which resulted in criminal convictions." He claims he "had no new contact with law enforcement from 2004 until this case," even though, as he concedes, he "violated his parole in 2006, 2007, 2009 and 2010." Defendant also relies on the fact that, in the current offense, there was no allegation that he "used, pointed, or threatened to use the firearm."

However, given his criminal history, defendant fails to show that the trial court's ruling was "so irrational or arbitrary that no reasonable person could agree with it."

(*People v. Carmony, supra*, 33 Cal.4th at p. 377.) The trial court did not abuse its discretion in refusing to dismiss the prior strike allegation.

Defendant mischaracterizes his *Romero* motion as a motion to "dismiss priors," including his three prior prison terms. He also argues that one of the prior prison terms was based on the prior serious felony conviction, thus "resulting in double punishment for the same conviction." In addition, he argues defendant's "sentence in this case is cruel, unusual and excessive punishment in violation of the United States Constitution."

Defendant has forfeited each of these contentions because he failed to assert them in the trial court (*People v. Norman* (2003) 109 Cal.App.4th 221, 229) and because each contention is asserted perfunctorily without argument or supporting authority. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11; *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Wharton* (1991) 53 Cal.3d 522, 563.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment at item 3, replacing "PC 677.5(b)" with "PC 667.5(b)." The trial court shall send a certified copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

MAURO, J.

We concur:

ROBIE, Acting P. J.

HOCH, J.